Filed 11/20/15 Britz v. Kochergen CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

| | |
|---|---|
| BRITZ, INC.,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MIKE J. KOCHERGEN, as Executor, etc., et al.,<br><br>Defendants and Appellants. | F068982<br>Fresno County<br><br>(Super. Ct. No. 13CECG02782)<br><br>**ORDER MODIFYING OPINION AND DENYING REHEARING**<br>[NO CHANGE IN JUDGMENT] |

**THE COURT:**

It is ordered that the opinion filed herein on June 10, 2015, be modified as follows:

1. On page 12, the first full paragraph beginning "In this action also" is deleted and the following paragraph inserted in its place:

> In this action also, consolidation accomplished the purpose of the compulsory cross-complaint statute and avoided forfeiture of Britz's breach of contract claim. Kochergen has not properly challenged the consolidation order in this court. While he suggests consolidation denied him the opportunity to show Britz's bad faith in order to prevent it from filing a belated compulsory cross-complaint, Kochergen has not presented an argument challenging the consolidation order under a separate heading, supported by argument and citation to authority. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 457, fn. 4.) Thus, we need not consider this argument.

There is no change in the judgment. Appellant's petition for rehearing is denied.

_____
HILL, P.J.

WE CONCUR:

_____
GOMES, J.

_____
PEÑA, J.

Filed 6/10/15 Britz v. Kochergen CA5 (unmodified version)



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRITZ, INC.,

Plaintiff and Respondent,

v.

JOHN A. KOCHERGEN,

Defendant and Appellant.

F068982

(Super. Ct. Nos. 13CECG02782, 12CECG03966)

# OPINION

APPEAL from an order of the Superior Court of Fresno County. Kristi Culver-Kapetan, Judge.

Dowling Aaron Incorporated and Daniel O. Jamison for Defendant and Appellant.

Wilkins, Drolshagen & Czenshinski, James H. Wilkins and Quentin Cedar for Plaintiff and Respondent.

-ooOoo-

Defendant appeals from the denial of his special motion to strike the complaint, which he contends commenced a strategic lawsuit against public participation (SLAPP). While the trial court found defendant established that the challenged cause of action arose from defendant's protected activity (filing a complaint to initiate a judicial action against plaintiff), it also concluded plaintiff demonstrated its probability of prevailing on the merits, thereby defeating defendant's claim that the action is a SLAPP. We agree with

the trial court that plaintiff has met its burden of demonstrating its probability of success on the merits. Accordingly, we affirm the order.

## ***FACTUAL AND PROCEDURAL BACKGROUND***

The complaint in this case was filed August 28, 2013. Britz, Inc. (Britz) sued John Kochergen, alleging in a single cause of action that Kochergen breached a settlement agreement the parties entered into on May 8, 2009 (the 2009 settlement agreement). The complaint alleged Kochergen and Britz are separately engaged in the business of acquiring and dealing with oil and gas mineral interests and, in the past, they have jointly acquired oil and gas mineral interests. Britz alleged the 2009 settlement agreement required Kochergen to release Britz from "any and all causes of action or claims in law or in equity arising from any mineral acres, mineral interests, or oil and gas interests of any nature whatsoever, wherever located." Kochergen allegedly breached the agreement by filing, on December 17, 2012, a complaint against Britz alleging several causes of action arising from oil and gas mineral interests located in Fresno and Kings Counties (the 2012 action); Britz contended the claims asserted in the 2012 complaint were released in the 2009 settlement agreement. Britz alleged it was damaged by incurring attorney fees and costs to defend the 2012 action.

The 2009 settlement agreement resolved an action filed in 2007 (the 2007 action) by Kochergen against Britz and Robert Glassman, its vice-president and chief financial officer. The complaint in the 2007 action alleged Kochergen and Britz entered into a joint venture agreement in the 1980s involving the purchase of mineral interests in the Merrick Ranch property in Oklahoma. In several causes of action including intentional misrepresentation and breach of fiduciary duty, Kochergen alleged Britz kept royalties from the joint mineral interests and did not distribute them to Kochergen in accordance with the parties' agreement. The complaint alleged Glassman and Britz induced Kochergen, who was 80 years old at the time and mentally infirm, to enter into an agreement (the 1999 agreement) releasing Kochergen's interest in certain purportedly

nonproducing mineral interests that were part of the Merrick Ranch joint venture. Kochergen allegedly discovered in 2007 that production was ongoing on the Merrick Ranch mineral acres. Included in the 2009 settlement agreement resolving that litigation was a mutual release of claims.

The complaint in the 2012 action, which Britz asserts breached the 2009 settlement agreement, was filed by Kochergen and John A. Kochergen Properties, Inc., against David Britz, Martin Britz, Linda Britz Glassman, and Britz, Inc.[1] It sought to quiet title to certain mineral rights on property in Fresno County and Kings County, based on a joint venture or partnership that commenced in 1974 and was dissolved pursuant to a 1986 agreement between the parties. The complaint alleged the 1986 agreement required the Britz parties to convey the oil, gas and mineral rights to Kochergen, but they have refused to do so. The complaint also alleged the failure to convey the mineral rights was a breach of contract and a breach of the Britz parties' fiduciary duties to Kochergen. The Britz parties answered the second amended complaint on October 17, 2013.

On March 21, 2013, Kochergen, Kochergen Enterprises Family Limited Partnership, and Mike Kochergen filed a petition commencing an action in an Oklahoma state court against Britz, and others, seeking to quiet title to an interest in the mineral rights on property in Oklahoma described as the west half of section 11-11-26. Britz answered the petition on June 26, 2013. On September 24, 2013, Britz filed a first amended answer and a counterclaim against the Kochergen plaintiffs. The counterclaim alleged Britz held an interest in the mineral acres underlying the west half of section 11-

---

**1** In conformity with the quiet title statutes, the complaint also named as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien or interest in the property described in the complaint adverse to plaintiff's title or any cloud upon plaintiff's title thereto." (Code Civ. Proc., §§ 762.060, 762.020.)

11-26 and sought a decree declaring Britz owned that interest and enjoining the Kochergen plaintiffs from asserting any claim adverse to it.

In response to the complaint in the current action, Kochergen filed a special motion to strike against Britz, pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute. The motion asserted Britz's complaint was based on Kochergen filing the 2012 action against Britz, which was an activity in furtherance of his right of petition protected by the anti-SLAPP statute. Kochergen further asserted Britz could not establish a probability it would prevail on the merits because the 2009 settlement agreement did not release the claims alleged in the 2012 action and Britz's claim was legally insufficient because it was required to be, but was not, brought as a compulsory counterclaim in the Oklahoma action or in the 2012 action. Britz opposed the motion. After oral argument, the trial court denied the motion and, on its own motion, consolidated the current action with the 2012 action. Kochergen appeals.[2]

## ***DISCUSSION***

### I. Anti-SLAPP Motion

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)[3] "The Legislature enacted section 425.16 to prevent

---

[2] We deny Kochergen's request for judicial notice, filed June 27, 2014, because we need not reach the issue to which it relates in order to decide the merits of the appeal. We also note we have disregarded the supplemental letters submitted by the parties after briefing, with the exception of the citation of two cases by Kochergen in his January 22, 2015, letter: *Vargas v. City of Salinas* (2009) 46 Cal.4th 1 and *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577.

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

and deter 'lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought '"to prevent SLAPPs by ending them early and without great cost to the SLAPP target"' [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.] In doing so, section 425.16 seeks to limit the costs of defending against such a lawsuit." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 (*Varian*).)

"Section 425.16, subdivision (b)(1) establishes 'a two-step process for determining' whether an action should be stricken as a SLAPP. [Citation.] First, the court must determine 'whether the defendant has made a threshold showing that the challenged cause of action' arises from an act in furtherance of the right of petition or free speech in connection with a public issue. [Citation.] Second, the court must 'determine whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] If the defendant makes a threshold showing that the cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing, then the court must strike the cause of action [citation] and award the defendant 'attorney's fees and costs.'" (*Varian, supra,* 35 Cal.4th at p. 192.)

"'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits … upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of

law.”’” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326 (*Flatley*).) An order granting or denying a special motion to strike is an appealable order. (§ 425.16, subd. (i).)

## II. Defendant’s Protected Activity

The first step in the analysis of an anti-SLAPP motion is to determine whether the defendant has made a threshold showing that plaintiff’s complaint contains causes of action arising from protected activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) “‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e).’” (*Ibid*.) Section 425.16, subdivision (e) defines “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ [to include] (1) any written or oral statement or writing made before a … judicial proceeding … [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a … judicial body.” (§ 425.16, subd. (e).) Filing a complaint in a judicial action falls squarely within this definition. (See *Navellier*, *supra*, 29 Cal.4th at p. 90.)

The Britz complaint alleges Kochergen breached the settlement agreement by filing the complaint in the 2012 action. There is no dispute in this appeal that the first prong of the anti-SLAPP test—that plaintiff’s cause of action arises out of defendant’s protected activity—has been met.

## III. Plaintiff’s Probability of Success on the Merits

“[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have ‘“stated and substantiated a legally sufficient claim.”’ [Citations.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”’” (*Navellier*, *supra*, 29 Cal.4th at pp. 88-89.)

### *A. Legally sufficient claim*

The complaint in this action alleges one cause of action for breach of contract. It alleges Britz and Kochergen jointly acquired oil and gas mineral interests in Oklahoma, referred to as the Merrick Minerals. In 2007, a dispute arose about their respective ownership interests in the Merrick Minerals, and Kochergen sued Britz. The parties resolved the dispute in their 2009 settlement agreement. The mutual release in the 2009 settlement agreement broadly released all known and unknown claims relating to any oil and gas mineral interests wherever located. Nonetheless, in 2012, Kochergen and his corporation, John A. Kochergen Properties, Inc., sued Britz and others, alleging causes of action to quiet title to mineral rights in Fresno and Kings counties, for specific performance, and for breach of fiduciary duty, among other things. The mineral interests that were the subject of the 2012 complaint arose out of transactions that took place in 1974 and 1986. Kochergen breached the 2009 settlement agreement by filing the 2012 complaint against Britz. As a proximate result of that breach, Britz has incurred attorney fees and costs to defend the 2012 action.

Kochergen does not contend the allegations of the cause of action itself are insufficient to state a cause of action for breach of contract. Rather, he contends the claim was required to be filed either as a compulsory counterclaim in the Oklahoma action or as a compulsory cross-complaint in the 2012 action; because it was not filed in either action, Kochergen contends the claim was forfeited and cannot now be prosecuted. Accordingly, he contends, Britz does not have a legally sufficient claim.

The compulsory cross-complaint statute provides: "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." (§ 426.30, subd. (a).) "'Related cause of action' means a cause of action which arises out of the

same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." (§ 426.10, subd. (c).) The purpose of the compulsory cross-complaint statute "is to provide for the settlement in a single action of all conflicting claims between the parties arising out of the same transaction and thus avoid multiplicity of actions and judgments. To achieve this purpose, the statute has been liberally construed. The term 'transaction' is not limited to a single, isolated act or occurrence, but may embrace a series of acts or occurrences logically interrelated." (*Carey v. Cusack* (1966) 245 Cal.App.2d 57, 66.)

**1. The Oklahoma action**

Kochergen contends the Britz claim was required to be asserted in a compulsory counterclaim in the Oklahoma action. He asserts Britz filed a counterclaim in that action, alleging Kochergen's claims there were barred by the release in the 2009 settlement agreement, and therefore Britz was entitled to have its title to the property interests alleged there quieted and to obtain an injunction against Kochergen asserting adverse claims to those property interests. According to Kochergen, Britz's counterclaim put in issue the scope of the release in the 2009 settlement agreement, and therefore put in issue the entire contractual relationship arising out of the 2009 settlement agreement. Consequently, Britz was required to allege in that counterclaim the related claim that Kochergen's 2012 action was barred by the release in the 2009 settlement agreement and therefore Kochergen's filing of the 2012 action breached that agreement.

Kochergen's argument is not supported by the record. The cross-complaint filed by Britz in the Oklahoma action does not mention the 2009 settlement agreement, or any settlement or release agreement. It simply alleges Britz owns "an undivided 15.00 net mineral acres underlying the W/2 of Section 11, Township 11 North, Range 26 West, Beckham County, Oklahoma." It alleges plaintiffs (Kochergen and others) "claim or may claim some right, title, estate, lien, or interest in or to the described real property adverse to the title of" Britz. The counterclaim then requests that the court determine all adverse

claims to the real property, quiet Britz's title to its claimed interest, and enjoin plaintiffs from asserting any claims adverse to Britz's title. The counterclaim does not support Kochergen's argument that it put in issue the scope of the 2009 settlement agreement or any related claims. The evidence does not support Kochergen's argument that the breach of contract claim Britz alleged in the current action was required to be asserted as a compulsory counterclaim in the Oklahoma action. Hence, Kochergen, who bears the burden of establishing prejudicial error on appeal (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601), has not demonstrated the trial court erred in rejecting his argument that Britz's current claim was required to be asserted as a compulsory counterclaim in the Oklahoma action.

**2. The 2012 action**

Kochergen contends Britz was required to file its claim as a compulsory cross-complaint in the 2012 action. The complaint in the 2012 action alleged Kochergen and others entered into a joint venture agreement with Albert and Helen Britz (later succeeded by Britz, Inc. and others) in 1974. Kochergen gave the Britzes a mineral deed (the 1974 mineral deed) applying to oil, gas, and other minerals in the Kochergen Ranch land. In 1986, the parties entered into an agreement dissolving the joint venture. As a result of performance of both agreements, Kochergen acquired an equitable or legal ownership interest in the oil, gas, and mineral rights described in the 1974 mineral deed. Kochergen later discovered the 1974 mineral deed was never transferred back to Kochergen as required by the 1986 agreement, but remained of record. Kochergen asked the Britz defendants to quitclaim the interest back to Kochergen, but they refused. Kochergen sought to quiet title to the oil, gas, and mineral interests; he also alleged causes of action for breach of contract, breach of fiduciary duty, and constructive or resulting trust arising out of the same factual allegations.

Kochergen contends the current action by Britz, alleging Kochergen breached the 2009 settlement agreement by filing the 2012 action, is logically related to the 2012

action. Both will present similar issues regarding whether the claims raised in the 2012 action were released as a result of the release language in the 2009 settlement agreement. Further, Kochergen asserts that, by arguing in favor of consolidation, Britz conceded the two actions present common questions of law and fact. Accordingly, Britz's claim was required to be raised as a compulsory cross-complaint in the 2012 action, and because it was not, it is now barred.

We need not determine whether Kochergen is correct in asserting the current action and the 2012 action are related causes of action for purposes of the compulsory cross-complaint statute. We conclude the purpose of the compulsory cross-complaint statute was served by consolidating the two actions, and the Britz breach of contract action is not forfeited or barred by failure to include the claim in a cross-complaint in the 2012 action.

Leave to file a compulsory cross-complaint will be granted while the action is pending, in the absence of bad faith. Section 426.50 provides: "A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action." Under this section, "[t]he legislative mandate is clear.… A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith." (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98-99.) ""'Bad faith" is defined as "[t]he opposite of

'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake ..., but by some interested or sinister motive[,] ... not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity;... it contemplates a state of mind affirmatively operating with furtive design or ill will.'"" (*Id*. at p. 100.)

In *Ranchers Bank v. Pressman* (1971) 19 Cal.App.3d 612 (*Pressman*), Pressman entered into a contract with Knoll to buy an automobile agency; the bank financed the operation of the business. (*Id*. at p. 616.) Dissatisfied with the purchase, Pressman gave notice of rescission of the contracts with Knoll and the bank. The bank sued Pressman; Pressman cross-complained against the bank for rescission and against the bank and Knoll for fraud. (*Ibid*.) Knoll separately sued Pressman on the promissory note for purchase of the business. In response, Pressman asserted Knoll was required to file his claim as a counterclaim to Pressman's cross-complaint in the bank's action. The two actions were consolidated for trial, and the trial court found in favor of Knoll and the bank. (*Ibid*.)

On appeal, Pressman again asserted Knoll's claim was barred by his failure to plead it as a counterclaim to Pressman's cross-complaint. (*Pressman, supra*, 19 Cal.App.3d at pp. 618-619.) The court concluded Knoll's promissory note claim and Pressman's fraud cross-complaint both arose out of the same transaction—the sale of the automobile business. (*Id*. at p. 620.) Knoll's claim also met the other requirements of a compulsory cross-complaint. (*Id*. at pp. 620-621.) The court concluded, however, that the error was cured by consolidation. "[C]ourts have approved the consolidation of counteractions growing out of the same transaction in lieu of filing a counterclaim in the first action. Use of this alternative procedure accomplishes the basic policy of section 439 [now section 426.30]. 'The policy of the law … is to require reciprocal rights flowing from a common source to be determined in a single action, thus avoiding not

only unnecessary vexatious litigation but also the contingency of conflicting judgments.…' The law abhors forfeitures. [Citation.] The consolidation of the two actions for trial accomplished the purpose of section 439 and that of avoiding the forfeiture of Knoll's claim on the note. We hold therefore that such consolidation cured the error of noncompliance with section 439." (*Id*. at pp. 621-622.)

In this action also, consolidation accomplished the purpose of the compulsory cross-complaint statute and avoided forfeiture of Britz's breach of contract claim. Kochergen did not object to consolidation in the trial court. Generally, an appellate court will not consider procedural defects or erroneous rulings unless an objection was made in the trial court; this is because "'"it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial."'" (*Arabia v. BAC Home Loans Servicing, L.P*. (2012) 208 Cal.App.4th 462, 478.) Kochergen also has not properly challenged the consolidation order in this court. While he suggests consolidation denied him the opportunity to show Britz's bad faith in order to prevent it from filing a belated compulsory cross-complaint, Kochergen has not presented an argument challenging the consolidation order under a separate heading, supported by argument and citation to authority. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 457, fn. 4.) Thus, we need not consider this argument.

Moreover, Kochergen's only argument that Britz acted in bad faith sufficient to justify denying leave to file a compulsory cross-complaint in the 2012 action was the statement that Britz "acted in bad faith by trying to overburden the elderly Kochergen with [Britz's] separate lawsuit, which conduct was also heedless of the burden [Britz's] separate lawsuit imposed on the court." Kochergen fails to explain how filing a claim in a separate action (which is later consolidated with the first action) is significantly more burdensome on the defendant or the court than filing the same claim as a cross-complaint in an existing action.

Thus, even if the claim asserted in the Britz complaint in this action constitutes a compulsory cross-complaint required to be filed in the 2012 action, and Britz improperly filed it as a separate action, the error was cured by consolidation. The purpose underlying the compulsory cross-complaint statute has been served by consolidating the two actions: the related claims can be determined in a single action, thereby avoiding a multiplicity of actions and the possibility of conflicting judgments. Additionally, Britz is not barred from pursuing its claim, which it would be permitted to file as a cross-complaint in the 2012 action in the absence of a showing of bad faith.

Thus, the trial court correctly found that the Britz complaint presents a legally sufficient claim. The claim is not legally insufficient because it is barred by Britz's failure to file it as a compulsory cross-complaint in the 2012 action, although we reach that conclusion for reasons other than those stated by the trial court.[4]

***B. Prima facie showing of breach of contract***

The second step in analyzing whether an action should be stricken as a SLAPP is determining whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Varian*, *supra*, 35 Cal.4th at p. 192.) In this step, the trial court "considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. [Citations.] The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward." (*HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 212 (*HMS Capital*).) "[T]he plaintiff '"must

---

**4** """[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."""" (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

demonstrate that the complaint is … supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’’’’ (*Navellier, supra*, 29 Cal.4th at pp. 88-89.) The showing required of a plaintiff at this stage is ‘‘‘‘not high.’’’’ (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 590-591.) The plaintiff need only show a ‘‘‘‘minimum level of … triability’’’’ or ‘‘a case of ‘‘minimal merit.’’’’ (*Id*. at p. 591.) ‘‘Whether plaintiffs have established a prima facie case is a question of law.’’ (*HMS Capital*, at p. 212)

“[T]he elements of [a breach of contract] cause of action are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages.” (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.) In his anti-SLAPP motion, Kochergen challenged only Britz’s ability to substantiate the element of breach of the contract. He asserted Britz could not establish a probability it would prevail on the merits of its claim because the 2009 settlement agreement did not release Britz from the claims Kochergen alleged against it in the 2012 action; thus, assertion of those claims did not breach the 2009 agreement. Kochergen placed numerous documents before the trial court by requesting judicial notice be taken of them; the court granted that request, specifying in some cases it was taking judicial notice of the existence or filing of the documents, without taking judicial notice of the truth of any matters asserted in them.

The trial court took judicial notice of the Britz complaint in the current action and the exhibits attached to it, including the 2009 settlement agreement. The Britz complaint alleged Kochergen breached the 2009 settlement agreement by filing the 2012 action against Britz. Kochergen admitted in his declaration in support of the anti-SLAPP motion that he signed the 2009 agreement; he explained his understanding of its release terms. The trial court also took judicial notice of the original, first amended, and second amended complaints in the 2012 action. In opposition to the anti-SLAPP motion, Britz presented its interpretation of the 2009 settlement agreement, based on the plain meaning

of the release language used, and argued it barred Kochergen's 2012 action. Britz did not place evidence of the 2009 settlement agreement or the pleadings in the 2012 action before the trial court, because Kochergen had already done so. Thus, the trial court had before it evidence and argument by Britz supporting the existence of a contract between the parties and a breach by Kochergen.

For the first time in his reply brief, Kochergen asserts Britz failed to substantiate the damages element of its breach of contract cause of action. "A party may not raise an issue for the first time on appeal [citation], and points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier." (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) Kochergen has offered no explanation for the failure to raise this point earlier. Accordingly, we will not consider it.

Britz contends section 2a of the 2009 settlement agreement released the claims Kochergen is asserting in the 2012 action, and therefore Kochergen breached that agreement by suing them after agreeing not to. Section 2a provides:

> "Except with respect to the covenants, promises, and obligations arising from this Agreement, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties, on behalf of themselves and anyone who may succeed to their rights and responsibilities, such as their heirs, spouses, predecessors, successors, assigns, representatives, affiliates, partners, attorneys, agents, shareholders, officers, and employees, do hereby fully, finally and forever release, relieve, waive, and forever discharge each other and their respective heirs, spouses, predecessors, successors, assigns, representatives, affiliates, partners, attorneys, agents, shareholders, officers, and employees, and each of them, of and from any and all causes of action, claim, debt, liability, obligation, account and lien of any kind whatsoever, in law or in equity, arising from the claims or subject matter of the Dispute, *or from any other mineral acres, mineral interests, or oil and gas interests of any nature whatsoever within Oklahoma or elsewhere*, including the well known as Tipton 2-29, whether or not presently known, alleged, or which might have been alleged in connection with the Dispute, whether suspected or unsuspected, disclosed or undisclosed, fixed or contingent. However, KOCHERGEN and BRITZ,

> INC., are and will remain co-tenants or co-owners on many oil and gas investments, some of which are interests that KOCHERGEN retained when he deeded certain of his interests to BRITZ, INC., in connection with the document entitled 'Agreement,' and which document was dated January 28, 1999. Neither Party's existing status as a co-owner and future rights respecting such interests are affected by this Agreement." (Italics added.)

Britz argues that the italicized language, by its plain meaning, broadly released all claims arising from "any … mineral acres, mineral interests, or oil and gas interests of any nature whatsoever within Oklahoma or elsewhere." The second amended complaint in Kochergen's 2012 action describes the oil, gas, and mineral rights in Fresno and Kings Counties that are the subject of the action. It essentially alleges Kochergen and others gave the 1974 mineral deed to the Britzes; the mineral deed should have been conveyed back to Kochergen pursuant to the provisions of the 1986 Agreement of Dissolution of Venture, but either it was not conveyed or the deed was lost. The 2012 complaint sought to quiet title in Kochergen to the mineral interests described in the 1974 mineral deed, or to have those mineral interests transferred by the court to Kochergen's successor, John A. Kochergen Properties, Inc.

In interpreting a contract, the court's objective is to give effect to the mutual intention of the parties as it existed at the time the contract was executed. (Civ. Code, § 1636.) "Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126; Civ. Code, § 1639.) Extrinsic evidence is admissible to interpret an agreement only when a material term is ambiguous. (*Wolf*, at p. 1126.)

Britz does not contend the contract is ambiguous and requires extrinsic evidence to interpret it; rather, Britz contends the plain meaning of the language governs. Looking at the language italicized in the quotation above, Britz interprets the 2009 settlement agreement to release all of the parties' claims against each other, first those arising out of the 2007 lawsuit, but also those arising from any oil, gas or mineral interests, in

Oklahoma or anywhere else, whether those claims are known to the parties or not. Further, Britz contends the subsequent language, excluding from the release claims involving oil and gas investments in which the parties are co-owners or cotenants, does not apply because Kochergen admitted in the 2012 complaint that title to the oil, gas, and mineral interests in issue in that case was held by Britz.

The language Britz relies on is susceptible to the interpretation it suggests. The quoted provision does not stop with releasing causes of action or claims "arising from the claims or subject matter of the Dispute" in the 2007 action. It releases those claims, then continues by releasing causes of action or claims arising "from any other mineral acres, mineral interests, or oil and gas interests of any nature whatsoever within Oklahoma or elsewhere." As Britz points out, interpreting the release as applying only to claims that were or could have been asserted in the 2007 action would make the later language, concerning claims arising from mineral interests "within Oklahoma or elsewhere," inoperative or meaningless; such an interpretation is to be avoided. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473-474.)

In ruling on an anti-SLAPP motion, the court must "accept as true the evidence favorable to the plaintiff." (*HMS Capital, supra*, 118 Cal.App.4th at p. 212.) If the 2009 settlement agreement is interpreted as proposed by Britz, Kochergen's filing of the 2012 action would appear to breach that agreement. Thus, Britz has made the showing of minimal merit necessary to survive an anti-SLAPP motion. (See *Navellier*, *supra*, 29 Cal.4th at p. 93.)

Kochergen points to other language in the contract which he contends indicates the parties intended to limit the release to claims that were, or could have been, alleged in the 2007 dispute that was the subject of the 2009 settlement agreement. He also offered extrinsic evidence, through his own declaration, of his understanding that the release was so limited. He argues that, because his was the only extrinsic evidence presented, it was uncontradicted and had to be accepted and given effect by the trial court.

The court, in reviewing the ruling on an anti-SLAPP motion, however, does not weigh the evidence and determine which party should prevail. (*Flatley, supra,* 39 Cal.4th at p. 326.) Rather, the court "'accept[s] as true the evidence favorable to the plaintiff [citation] and evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Ibid*.) The court "merely determines whether a prima facie showing has been made that would warrant the claim going forward." (*HMS Capital, supra,* 118 Cal.App.4th at p. 212.)

The extrinsic evidence proffered by Kochergen is only relevant if it defeats Britz's evidence as a matter of law. Kochergen's evidence, however, merely suggests the release language in the contract is ambiguous and will require interpretation at trial. It does not defeat the evidence favoring Britz as a matter of law. At best, Kochergen's evidence indicates that, if the agreement is ambiguous and extrinsic evidence is necessary to interpret it, there is extrinsic evidence that would support an interpretation other than the one for which Britz argues.

Kochergen argues that, in the absence of competing extrinsic evidence, the court must accept his extrinsic evidence and rule in his favor. But even uncontradicted evidence may be rejected by the trier of fact. "'[T]the trial judge may reject the uncontradicted testimony of a witness provided he does not act arbitrarily. [Citation.] "Relevant in this respect are many considerations: interest of the witness in the result of the case, his motive, the manner in which he testified, and the contradictions appearing in the evidence.'" (*Carroll v. Dungey* (1963) 223 Cal.App.2d 247, 253. Kochergen's declaration concerning his understanding of the terms of the agreement merely creates a conflict in the evidence, demonstrating that a triable issue of material fact exists.

We conclude Britz satisfied the second prong of the anti-SLAPP test. It met its burden of demonstrating a probability of prevailing on its claim. Britz demonstrated its complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence in its favor is credited. Accordingly,

the trial court correctly denied Kochergen's special motion to strike the Britz complaint pursuant to section 425.16.

## ***DISPOSITION***

The order denying Kochergen's special motion to strike pursuant to Code of Civil Procedure section 425.16 is affirmed. Britz is entitled to its costs on appeal.

_____
HILL, P.J.

WE CONCUR:

_____
GOMES, J.

_____
PEÑA, J.